No. 89-387

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ROBERT POSS, *et al.*,
Petitioners-Appellants,
MICHAEL HOWARD, *et al.*,
Plaintiffs-Respondents,
v.
JOHN L. MCLUCAS, *et al.*,
Defendants-Respondents.

On Petition For a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a consent decree that provides promotions to victims of discrimination violates Title VII or the Constitution in a case in which the lower courts found pervasive *prima facie* racial discrimination?

2. Whether two courts below correctly found that the promotional provision was narrowly tailored "to eliminate the effects of past discrimination"?

LIST OF ALL PARTIES

Plaintiffs-Respondents

Michael Howard, Henry Taylor, Jr., Oliver Gilbert, Clifford Scott, Lewis T. Jones, and Thomas W. Miller, on behalf of themselves and all others similarly situated, and the American Federation of Government Employees and Irish Smith.

Defendants-Respondents

John L. McLucas, Secretary of the Air Force; Major General W.R. Hayes, Commander of Warner Robins Air Force Base and Administrator of Warner Robins Air Logistics Center; Robert Hampton, Chairman of the United States Civil Service Commission; Ludwig U. Andolsek, Commissioner, United States Civil Service Commission; Jayne B. Spain, Commissioner, United States Civil Service Commission.

Petitioners-Intervenors

Larry W. Abney, Dennis Adams, David Alford, Eddie C. Barfield, Katherine H. Barkemeyer, William H. Barkemeyer, Joseph N. Barlow, Howard Bell, Kathleen Bell, Paul E. Benton, Wayne A. Bowden, Johnny D. Bowen, Goldie Bright, Kenneth W. Brock, Ronald K. Brown, Billy W. Bryant, Linda Burnsed, Donald R. Buttorm, Kenneth R. Camp, Barney Chandler, James B. Chappell, Deanna Chase, Mary M. Clance, Robert L. Clance, Dave Cochran, Bill Cody, Robert R. Collins, Rusty Combs, Charles R. Cook, Martha J. Cook, Donald C. Crosby, Eugene A. Davis, Jim Davis, Kyle C. Dismuke, David Dixon, Marvin T. Drew, John E. Dunn, John A. Dunwoody, Joyce DuVernois, Donald Easler, Dale Edge, Charles F. Evans, John J. Evans, Billy S. Evatt, George Everette, Roger W. Ferguson, Jay A. Fitzgerald, Ronald A. Garrett, David C. Gilstrap,

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Johnny Peacock, M. Louise Peterman, Timothy Peters, Donald Peterman, Charles W. Phillips, Earl J. Pilgrim, Charles Porter, Robert T. Poss, Thomas Purvis, Robert R. Reese, June Renfroe, Robert R. Riggins, Jr., Gary T. Roberson, Rebecca L. Scribner, Grady W. Selph, Robert Shiver, Lillian N. Slappey, Richard J. Stafford, Jimmy L. Stanley, James H. Stephens, Melba Stokes, Ronald Strickland, Sue Sullivan, Jimmie L. Thomas, Shirley A. Thomas, Charles S. Vann, Frederick Veator, Richard A. Wall, James A. Wallace, Herbert Weaver, Herman B. West, Jr., Jim Wilcox, Larry H. Wilkes, Charles E. Williams, Jr., Irene K. Wilson, James E. Woodard, Jr., Ronnie Norman Woods, David Wynne, Jimmie Yawn, Hugh L. Yawn, and Martin A. Young.

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The opinion of the Court of Appeals for the Eleventh Circuit is reported at 871 F. 2d 1000 (1989) and is reprinted in Appendix A of the Petition. The opinion of the United States District Court for the Middle District of Georgia of September 30, 1987, as supplemented October 5, 1987, is reported at 671 F. Supp. 756 (1987). Petitioners reprinted the incomplete opinion in their Appendix B. Respondents will refer to the complete published district court opinion instead of Appendix B.

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MICHAEL HOWARD, et al.,
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v.

JOHN L. McLUCAS, et al.,
Defendants-Respondents

On Petition For A Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION

Respondents Michael Howard, et al., plaintiffs below, request that the petition for writ of certiorari filed by intervenors Robert Poss, et al., be denied.

STATEMENT OF THE CASE

A. Prior Proceedings

This Title VII action was originally filed on October 31, 1975 by black civilian employees of the Warner Robins Air Logistics Center ("Warner Robins") against defendant Secretary of the Air Force to challenge the denial of promotions to black employees. With approximately 15,000 civilian employees, Warner Robins is one of the largest employers in the State of Georgia. In 1976 the lawsuit was certified as a class action on behalf of approximately 3200 black employees.

After numerous pre-trial proceedings and extensive discovery, the parties submitted a proposed consent decree. A fairness hearing was held pursuant to Rule 23 of the Federal Rules of Civil Procedure in August 1984. The district

court received extensive evidence of discrimination, and found that "plaintiffs have made out a prima facie case of employment discrimination through the use of statistical evidence of disproportionate racial impact," Howard v. McLucas, 671 F. Supp. 756, 760 (M.D. Ga. 1987), by "present[ing] numerous statistical studies of work force, grade levels, occupational segregation, promotions, training, supervisory appraisals, test scores, and awards that demonstrate pervasive patterns of discrimination in the internal promotional system at Warner Robins." Id. at 766. The district court also received evidence of the nature and effect of the promotional relief provided by the consent decree. Id. at 761-68.

Robert Poss and 136 other white employees objected and were allowed to

participate in the fairness hearing as objectors. See Howard v. McLucas, 597 F. Supp. 1512, 1514 (M.D. Ga. 1984). Their counsel argued, presented evidence and examined witnesses. The court, however, denied their motion to participate formally as intervenors with the right to veto the settlement. Howard v. McLucas, 597 F. Supp. 1501 (M.D. Ga. 1984). Several class members also objected. Rejecting the objections of both black and white employees, the district court approved the consent decree.

The consent decree states that the promotion of 240 class members to every other available vacancy in specified jobs settled the claims of class members who alleged that they were victims of discrimination. See R. 256 at 6. Members of the class were selected for promotion through a victim identification

procedure, which the district court found identified those most likely to have been denied promotions on discriminatory grounds. The consent decree also provided for a $3.75 million class backpay fund and other injunctive relief.

In 1986, the Eleventh Circuit reversed the district court's denial of the white employees' motion to intervene. The court of appeals authorized intervention of Poss and the other white employees, but expressly limited their participation to challenging the promotional provision. Howard v. McLucas, 782 F.2d 956, 960-61 (11th Cir. 1986). The court denied authorization to intervenors to continue to challenge any other remedial provisions or to contest the district court's underlying findings of discrimination.

After considering the intervenors'

and parties' submissions on remand, the district court rejected intervenors' objections, which are reiterated in their petition. The court approved the decree "because it is based upon a predicate finding of discrimination by defendants and is victim specific." 671 F. Supp. at 767-68. The court also found that, to the extent the relief is not victim specific, it was narrowly tailored to eliminate the discrimination found. Id. at 768. The court of appeals affirmed on the same grounds. Pet. 10a-20a. Motions for a stay were denied by the Eleventh Circuit and this Court. En banc review was denied by the Eleventh Circuit. Pet. D.

Although petitioners fail to acknowledge the victim-specific nature of the promotional relief, two courts below upheld the decree precisely because it is victim specific. E.g., 671 F. Supp. at

766 ("[T]he court is fully persuaded that only identified victims of discrimination will benefit from the promotional relief."). Petitioners also fail to acknowledge that intervenors' objections that the promotional procedure was not narrowly tailored to eliminate discrimination were rejected by both courts below.[1]

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[1]On remand, intervenors were given a plenary opportunity to challenge the promotional provision. They failed to show that "any of the plaintiffs were not discriminated against." Pet 19a; see 671 F. Supp. at 764. None of the intervenors, moreover, presented any evidence that he or she had been injured in any way by operation of the promotional provision. Pet. 2a. The district court found that the intervenors presented no evidence of injury, and that 43 of the 137 intervenors had been promoted and another 56 were ineligible for promotion. 671 F. Supp. at 767 n. 4. The court of appeals found that, none presented evidence of any delay in receiving promotions. Pet. 9a. Notwithstanding intervenors' "tenuous" position to contest the consent decree, the courts below addressed the merits because "some delay may have occurred." Id.

B. FACTS

1. Record of Discrimination

The petition suggests that the promotional provision was based on a single statistic showing a disparity. This is incorrect. The lower courts found that a prima facie case had been proved with extensive statistical evidence of pervasive discrimination. Pet. 4a-5a, 671 F. Supp. at 760-61, 766.

Warner Robins for many years has filled upper level jobs by promoting qualified employees in lower level jobs through an internal promotion system on the basis of seniority, written examinations, supervisory appraisals, training, and awards. 597 F. Supp at 1508-09.[2] Nevertheless, the record shows

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[2]This case, therefore, is unlike Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115 (1989), in which higher level jobs were filled through outside recruitment rather than internal promotion.

that blacks "were concentrated in low level jobs and certain occupations." Pet. 4a, quoting 597 F. Supp at 1513. In 1973, when plaintiffs' administrative charges were filed, fully three quarters of black WG employees were in the lowest job levels, compared to less than a third of the white WG employees. See Pet. 4a, 671 F. Supp. at 760. Blacks were concentrated in menial occupations with little advancement potential. Although only 15% of the Warner Robins workforce, blacks constituted 86% of all janitors, 81% of all laborers, 76% of all packers, 76% of all motor vehicle operators, 71% of all woodcrafters and 67% of all parts and equipment operators. See Pet. 4a.

Statistics also "demonstrated that black employees were promoted ... in proportions less than their representation in the workforce or in lower grades."

Pet. 4a, 671 F. Supp. at 760, quoting 597 F. Supp at 1510. Plaintiffs compiled two statistical analyses of promotions, which were introduced by stipulation. See 597 F. Supp. at 1508 n. 1. The first showed that significant statistical disparities in promotion rates out of WG grade groups and GS grades 1-4, and that blacks lost 553 jobs from 1971-78.[3] The second analysis, more conservative because it

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[3]

Grade Group	Number of Standard Deviations	Expected Promotions Lost to Blacks
WG 1-4	6.01	67.98
WG 5-8	16.03	362.00
WG 9-12	4.80	50.06
GS 1-4	3.56	72.67

See Pet. 4a, 671 F. Supp. at 760, 597 F. Supp. at 1610. Fluctuations of more than two or three standard deviations undercut the hypothesis that selections for promotions were being made randomly with respect to race. See Castaneda v. Partida, 430 U.S. 482, 496 n. 17 (1977).

controlled for occupational series,[4] showed statistically significant disparities in WG categories, but no significant disparities in GS jobs. The conservative analysis showed blacks lost 234 jobs.[5]

Defendant Warner Robins also prepared an analysis of promotion statistics for trial, which plaintiffs summarized. The government's submission showed statistically significant disparities out of WG jobs and concluded that blacks lost

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[4]The record, however, indicates that employees in different series were qualified to be promoted to the same job. See R. 275, Tab E (government exhibit showing large pools of qualified employees for particular positions).

[5]

Grade Group	Number of Standard Deviations	Expected Promotions Lost to Blacks
WG 1-4	3.53	36.68
WG 5-8	8.19	162.84
WG 9-12	3.75	34.74

See Pet. 4a, 671 F. Supp. at 761.

328 positions.[6]

All the selection criteria used by Warner Robins, with the exception of seniority, had significant adverse impact on black employees. Id. See R. 285 at 40-41; R. 156, 28-37; R. 269, §§3d-h & k; R.268, Exhibit 1, 47-73, 100-07. For instance, while fluctuations of more than two or three standard deviations are sufficient to undercut the hypothesis that a selection device has a racially random effect, the passing scores of black employees on written examinations varied by as much as 50 standard deviations from those of white employees. R. 268, Exhibit 1 at 100; see id. at 100-07. Government

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[6]

Grade Group	Number of Standard Deviations	Expected Promotions Lost to Blacks
WG 1-4	4.60	70.98
WG 5-8	9.50	209.72
WG 9-12	4.29	46.53

R. 268, Exhibit 1, 85.

documents admitted the adverse impact. Warner Robins' EEO affirmative action plans stated that disparities in training were a "problem": For example, "[m]inorities received a disproportionate share of training in CY 1973 -- 7% of the total compared to their 15.2% population." R. 156, 30, 3a (admission). The 1976 affirmative action plan stated that "[l]ower appraisals for . . . minorities result in reduced promotional opportunities." See id. at 32, 3a (admission). EEO documents show consistent racial disparities in awards given to employees, which "no doubt reflects in the promotion figures where awards are ranking factors." See id. at, 38, 4a (admission).

The finding by the lower courts of unrebutted evidence showing prima facie discrimination in denial of promotions was

amply supported. That unrebutted evidence was thus "sufficient evidence to justify the conclusion that there has been prior discrimination." Wygant v. Jackson Board of Education, 476 U.S. 267, 277 (1986).[7]

2. The Promotional Provision

The district court found that class members identified for the 240 promotions were likely to have been eligible for the same promotions during the period when the discriminatory policies were in force, and, therefore, were "likely victim[s] of discrimination entitled to relief." 671 F. Supp. at 764, see id. at 763. "A more specific way of identifying these actual

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[7]Intervenors attach great weight to the fact that Warner Robins did not concede liability in the consent decree. Interveners ignore, however, that Warner Robins stipulated that the statistical disparities cited above, that undergird the prima facie discrimination findings, were true and correct. See 671 F. Supp. at 766 n.1; 597 F. Supp. at 1511 n. 1, 1513; R. 285 at 8-11, 40-41.

victims does not exist in this case." Id. at 763.

Because of Warner Robins' promotional system and record-keeping procedures, it was impossible to identify all employees who were actually qualified for promotion to jobs lost to blacks in the 1971-79 period, or even to reconstruct their qualifications at the time.[8] The supervisory appraisals and test scores of specific employees in the period are unavailable or incomplete. Pet. 3a-4a. It was also impossible to definitively rank the best qualified employees because all the then-existing criteria used for determining qualification, except

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[8] All employees were considered for promotion through a computerized ranking process in which qualifying criteria of employees were automatically assessed as vacancies came up. 597 F. Supp. at 1509. Warner Robins does not use the more usual announcement or posting system in which employees apply for promotions. 597 F. Supp. at 1508.

seniority, were shown to be discriminatory.

The parties used plaintiffs' conservative promotional analysis to identify the number of promotions lost to blacks and the specific jobs most likely to have been lost to blacks.[9] The parties then used the contemporaneous and only available computerized ranking of eligible class members present in the workforce during the relevant period in order to identify specific victims. Seniority and supervisory appraisal scores were used, but seniority, the only non-

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[9]671 F. Supp. at 762 (The 240 positions "represent, to the best extent possible, the most likely jobs lost to blacks from 1970 through 1979 as a result of the discrimination at Warner Robins."); 597 F. Supp. at 1513-14 ("Plaintiffs' computer-based promotional analysis for occupational series was actual evidence that approximately 240 promotions were lost to black WG employees . . . [T]he positions to be filled by blacks should have been filled by blacks years ago.").

discriminatory criteria, was given greatest weight.

The district court, therefore, had an ample basis to find that "the victim identification process . . . [was] a reliable and narrowly tailored process designed to assure that only victims of discrimination be afforded relief." 671 F. Supp. at 764 (emphasis added).

The district court heard and rejected intervenors' objections to the scope of the promotional provision. The court found that "to the extent the relief is not victim specific, it is still lawful since it is necessary to provide full relief to class members, it is flexible, waivable, and of limited duration; the number of positions offered is limited to the specific number of jobs statistically proven to have been lost to class members; and, finally, it does not unnecessarily

trammel the rights of third parties or create an absolute bar to their advancement since the impact of the relief is relatively diffuse in nature and many promotional opportunities continue to exist for these third parties." 671 F. Supp. at 768.

The court expressly found that there was no "less intrusive approach that might provide full relief to class members within a reasonable period of time." Id. at 767. The court, therefore, had substantial basis to conclude that the decree was narrowly tailored to eliminate prior discrimination.

REASONS TO DENY THE WRIT

I

The Courts Below Correctly Applied The Law Of This Court In Upholding A Consent Decree That Provides Relief To Specific Victims Of Discrimination Based On A Showing Of Pervasive Prima Facie Discrimination.

Petitioner intervenors assert that this case presents the important federal question whether an affirmative action set-aside can be justified by a mere underutilization of blacks. Pet. 11. This contention fails for two reasons: Petitioners initially claim that the only factual predicate for the promotional measure is "a statistical underutilization of blacks." The courts below found pervasive prima facie discrimination on the basis of a substantial record. Such a statistical showing "proved a prima facie case of systematic and purposeful

employment discrimination," International Brotherhood of Teamsters v. United States, 431 U.S. 324, 342 (1977). Second, petitioners claim that the promotional provision in question is an affirmative action program for employees who were not victims of discrimination. As the two lower courts correctly found, however, the promotions are specific relief for 240 victims of discrimination. Moreover, "[i]ntervenors have failed to show that any of these class members were not victims of defendants' discrimination." 671 F. Supp. at 764.

The instant case simply does not concern the permissible scope of affirmative action. The defining characteristic of affirmative action plans is that they are not confined to providing relief to actual victims of discrimination. See Local 28, Sheet

Metal Workers v. EEOC, 478 U.S. 421, 474 (1986) ("The purpose of affirmative action is not to make identified victims whole, but rather to dismantle prior patterns of discrimination and to prevent discrimination in the future . . . . [B]eneficiaries need not show that they were themselves victims of discrimination"); Local No. 93, International Association of Firefighters v. City of Cleveland, 478 U.S. 501, 515 (1986) ("courts may, in appropriate cases, provide relief under Title VII that benefits individuals who were not the actual victims of a defendant's discriminatory practices"); Firefighters v. Stotts, 467 U.S. 561, 579 (1984) (observing that the plan under review was supported by "no finding that any of the blacks protected from layoff had been a victim of discrimination").

As the Court noted in Regents of University of California v. Bakke, 438 U.S. 265, 301 (1978), "some burdens on other employees" and "various types of racial preferences" were tolerated in Franks v. Bowman Transportation Co., 424 U.S. 747 (1976), and other employment discrimination cases. Such victim-specific provisions, however, were distinguishable from similar measures in affirmative action programs because they were "held necessary '"to make [the victims] whole for injuries suffered on account of unlawful employment discrimination"'" and were "remedies for constitutional or statutory violations resulting in identified, race-based injuries to individuals held entitled to the preference." Bakke, 438 U.S. at 301 (quotations omitted).

This Court long ago held that a

central purpose of Title VII is "to make persons whole for injuries suffered on account of unlawful employment discrimination." Albermarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975); see Local 28, Sheet Metal Workers v. EEOC, 478 U.S. at 471 (individual "make whole" relief is not the only kind of remedy available under Title VII). The "make whole" purpose of Title VII is consistent with the historic purpose of the Civil Rights Acts to secure complete justice for victims of racial discrimination. "[T]he court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." Louisiana v. United States, 380 U.S. 145, 154 (1965).

Relief to individual victims of

discrimination is justified on the record. A finding of pervasive, classwide discrimination such as the district court made in this case is an appropriate basis for relief to individual class members. Price Waterhouse v. Hopkins, 109 S.Ct. 1775, 1799 (1989) (O'Connor, J., concurring) ("Because the class has . . . demonstrated that, as a rule, illegitimate factors were considered in the employer's decisions, the burden shifts to the employer 'to demonstrate that the individual applicant was denied an employment opportunity for legitimate reasons.'") (citations omitted). The law is settled that "[b]y 'demonstrating the existence of a discriminatory . . . pattern and practice' the plaintiffs ha[ve] made out a prima facie case of discrimination against the individual class members.'" Teamsters, 431 U.S. at

359, quoting Franks v. Bowman Transportation Co., 424 U.S. 747, 772 (1976). "[P]roof of a discriminatory pattern and practice creates a rebuttable presumption in favor of individual relief." Teamsters, 431 U.S. at 359 n. 45.

Courts, moreover, have recognized that the process of recreating the past, for example, in order to identify victims of discrimination, "will necessarily involve a degree of approximation and imprecision." Teamsters, 431 U.S. at 372. See Segar v. Smith, 738 F.2d 1249, 1289 & n.36, 1290 (D.C. Cir. 1984), cert. denied, 471 U.S. 1115 (1985); Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 260 (5th Cir. 1974), cert. denied, 439 U.S. 1115 (1979). While individualized hearings are "usually" required, Teamsters, 431 U.S. at 361, they are not mandatory "when the

class size or the ambiguity of promotion or hiring practices or the multiple effects of discriminatory practices or the illegal practices continued over a extended period of time calls forth [a] quagmire of hypothetical judgment[s]." Pettway, 494 F.2d at 261. See Domingo v. New England Fish Co., 727 F.2d 1429, 1444 (9th Cir. 1984); Segar, 738 F.2d at 1290; Stewart v. General Motors Corp., 542 F.2d 445, 452-53 (7th Cir. 1976), cert. denied, 433 U.S. 919 (1977); Association Against Discrimination in Employment, Inc., v. City of Bridgeport, 479 F.Supp. 101, 115 (D. Conn. 1979), aff'd, 647 F.2d 256 (2d Cir. 1981), cert. denied, 455 U.S. 988 (1982). In the instant case, the challenged remedy employed the best method possible under the circumstances to identify victims of pervasive promotional discrimination. See 597 F. Supp. at 1504

("The present parties have labored to reconstruct the record of thousands of personnel actions and have identified as best as possible the actual impact of past discrimination").

Assuming arguendo that the promotional provision is not a victim-specific remedy but an affirmative action remedy for nondiscriminatees, the measure is, nevertheless, appropriate. The lower courts' findings of prima facie discrimination are based on separate showings of promotional disparities and the adverse impact of a broad range of promotional criteria, buttressed by admissions in Warner Robins' affirmative action plans. This record of "persistent or egregious" discrimnation or "lingering effects of pervasive discrimination," Local 28, supra, 478 U.S. at 476, as the Eleventh Circuit properly held, showed

"that the government had a sufficient basis for concluding that remedial action was necessary." Pet. 13a. In so finding, both lower courts specifically measured the promotional provision against the legal principles set forth in the Court's recent affirmative action decisions under Title VII and the Constitution. E.g., United States v. Paradise, 480 U.S. 149 (1987); Johnson v. Transportation Agency, 480 U.S. 616 (1987); Local 28, 478 U.S. 421; Wygant v. Jackson Board of Education, 476 U.S. 267 (1986). The lower courts found not only a "manifest imbalance" in "traditionally segregated job categories", Johnson, 480 U.S. at 631; United Steelworkers of America v. Weber, 443 U.S. 193, 197 (1979), but "sufficient evidence to justify the conclusion that there has been prior discrimination." Wygant, 476 U.S. at 277. See Paradise, 480 U.S. at

167 ("The government unquestionably has a compelling interest in remedying past and present discrimination"). Wygant, 476 U.S. at 286 (O'Connor, J., concurring) ("The Court is in agreement that, whatever the formulation employed, remedying past or present racial discrimination by a [governmental] actor is a sufficiently weighty [governmental] interest to warrant the remedial use of a carefully constructed affirmative action program". The record in this case, therefore, justifies race conscious relief.

The particular form of race conscious relief, the set aside of 240 promotions, is fully commensurate with the prima facie case, and was found to be the only measure under the circumstances that "would provide the full relief necessary to remove promptly the remaining vestiges of

discrimination at Warner Robins". Pet. 15a; 671 F. Supp. at 767. Review on Certiorari, therefore, is inappropriate.

II

The Lower Courts Correctly Decided That The Promotional Provision Was Narrowly Tailored "to Eliminate the Effects of Past Discrimination."

Petitioners assert that the Eleventh Circuit failed to consider race neutral alternatives and that the promotional provision was not narrowly tailored. With respect to the first assertion, petitioners had an opportunity to present alternatives both at the Rule 23 fairness hearing and subsequently on remand from the Eleventh Circuit. On neither occasion did they present any race-neutral proposals.[10] That omission is understandable: Warner Robins, as petitioners point out, has had an affirmative action program, pursuant to

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[10] See Johnson v Transportation Agency, 480 U.S. at 628; Wygant v. Jackson Bd. of Education, 476 U.S. 277-78 (burden of proof on intervenors to show unconstitutional violation of Title VII).

which the kinds of race-neutral measures petitioners now propose were employed. See 41 CFR 60-2.20-2.26. Warner Robins' affirmative action reports admitted that, notwithstanding these efforts, patterns of prima facie discrimination occurred. The parties, therefore, were correct in assuming that race-neutral measures of the kind petitioners espouse now would have been ineffective.

With respect to narrow tailoring, the lower courts gave petitioners a full opportunity to make their case and rejected their factual contentions that the promotional provision could have been more narrowly drawn. Pet. 15a-19a; 671 F. Supp. at 766-67. These twice-rejected contentions are neither meritorious nor appropriate for certiorari. See, Blau v. Lehman, 368 U.S. 403, 411 (1962). They merely seek to enlist the Court in

reviewing evidence and discussing specific facts. United States v. Johnston, 268 U.S. 220, 227 (1925); see Anderson v City of Bessemer City, 470 U.S. 564, 574 (1985) ("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous").

The courts below properly found that the promotional relief was necessary and that other proposed remedial alternatives were not feasible. Pet. 16a; 671 F. Supp. at 767. "The flexibility and short duration of the promotional relief cannot seriously be called into question." Pet. 17a, 671 F. Supp at 766-67. "The 240 special promotions do not represent or achieve any aggregate proportionality" or numerical goal. Pet. 17a. The impact of the provision is "relatively diffuse" and spread throughout the workforce. Pet. 18a,

671 F. Supp. at 766-67. They constitute only 4.3% of the total Warner Robins promotions. Pet. 7a; 671 F. Supp. at 767. The best method of determining the actual victims of discrimination was utilized. Pet. 19a; 671 F. Supp. at 766-67. Two courts below made extensive findings that "[w]hile the identification process is not flawless, it is, in the court's best judgment, a reasonable and fair identification procedure designed to choose the most likely victims of dis-crimination," in light of the available documentary sources and peculiarities of the Warner Robins promotional process. 671 F. Supp. at 765. Petitioners' contentions, including the claim that the government "willfully destroyed records during the pending of this litigation", Pet. 36a, were properly rejected as incorrect and frivolous. 671 F. Supp. at 763-65.

CONCLUSION

The petition for writ to the Eleventh Circuit should be denied.

Respectfully submitted,

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